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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177192
Party	Plaintiff NAUTICA APPAREL, INC.
Correspondence Address	Stephen L. Baker Baker and Rannells, PA 575 Route 28, Suite 102 Raritan, NJ 08869 UNITED STATES n.friedman@br-tmlaw.com
Submission	Motion to Strike
Filer's Name	John M. Rannells
Filer's e-mail	officeactions@br-tmlaw.com, k.hnasko@br-tmlaw.com, jmr@br-tmlaw.com
Signature	/john rannells/
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Attachments	91177192 nautica evid objections.pdf (5 pages)(193008 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NAUTICA APPAREL, INC.,

Opposer,

v.

MARTANNA LLC,

Applicant.

Opp. No. 91177192

Mark: GET NAUTI

Serial No. 78610037

**OPPOSER'S OBJECTIONS TO APPLICANT'S THIRD NOTICE OF RELIANCE
AND TO EXHIBIT A-5 INTRODUCED BY APPLICANT DURING THE TESTIMONY
DEPOSITION OF OPPOSER'S WITNESS, MARGARET BIZZARI**

A. Applicant's Third Notice of Reliance.

The documents attached to Applicant's Third Notice of Reliance are comprised of three articles, namely:

1. *The New York Times* 8/24/2008, ranking paperback books by sales volume. Number 8 in the list is a book titled "*Nauti Dreams*" with a short, one sentence description of the plot.
2. *Fort Wayne Journal Gazette* 8/6/2008, listing best-selling books. Under the heading "Paperbacks" the number 3 book is listed as "*Nauti Dreams*." The author's name is given. There is no further information given.
3. *Publishers Weekly*, 8/6/2008, with an unrated listing of "Fall 2007 Trade Paperbacks." On page 2 of the document there is a listing for a book titled "Nauti Nights." The author's name is given followed by a statement that the book "follows *Nauti Boy* as the second entry in this trilogy."

The three documents are admissible solely for the fact that in August of 2008 three publications mention a book or books with the term “NAUTI” in the title. Anything beyond that is hearsay.

The Applicant, in its Notice of Reliance, states that the articles are:

relevant because it demonstrates an example of the word “nauti” used in connection with a product sold in commerce in the United States, a book, and in which the word “nauti” is used as a fanciful spelling of the word “naughty . . .” “Also, each of these excerpts is relevant because it demonstrates an example in which the meaning of the word “nauti” is understood to be the same as that of the word “naughty” . . .

The documents do not stand for, are not relevant to show, and are not admissible for the purposes, conjectures and/or presumptions offered by the Applicant in its Third Notice of Reliance. Opposer objects to the articles on the ground that they are hearsay to the extent that Applicant seeks to rely on any statements made therein for the truth of any matter. This is not the typical case however, as the articles offered by Applicant do not actually even contain statements that Applicant seeks to rely upon for the truth of the statement. The Applicant is merely attempting to rely upon its own speculation and conjecture.

Further, it is unclear how “books” are relevant to a proceeding involving clothing goods and cosmetics. [See, the application in issue in this proceeding.]

The Board should not consider this exhibit in reaching its decision herein. See, *Corporation Habanos S.A. v. Annas Inc.*, 88 USPQ2d 1785 (TTAB 2008); and *TBMP* 704.08.

B. Applicant's Exhibit A-5 to the Testimony Deposition of Bizzari.

Exhibit A-5 was introduced by Applicant's attorney during cross examination of Nautica's witness, Margaret Bizzari¹. The Exhibit is comprised of 11 Internet web pages, namely:

Pages 1-2 of the exhibit were described by Applicant's attorney as search results conducted through yahoo.com. The pages appear to display the first 10 of 1570 hits for the term "nauticare."²

Pages 3-6 of the exhibit were described by Applicant's attorney as a search done on Yahoo concerning NAUTICARE. The pages are identified on the bottom as coming from www.shop.com.³

Pages 7-8 of the exhibit appear to be search conducted through yahoo.com displaying the first 10 of 60 hits for the phrase "nauticare nautica" (which also contains on the first page writing made by an unknown person.⁴

Page 9 of the exhibit was described by Applicant's attorney as a page from Nautica's website allegedly showing non-results of a search for the term "nauticare."⁵

Page 10 of the exhibit was described by Applicant's attorney as a page from Nautica's website allegedly showing non-results of a search for the term "nauticakids."⁶

Page 11 of the exhibit was described by Applicant's attorney as a page from Nautica's website allegedly showing a "hoodie" "designed with Nautex fleece."⁷

The person who allegedly accessed and downloaded the web pages was not identified and has not been called as a witness by Applicant for authentication or other purposes, and Nautica was therefore unable to cross-examine this unidentified person. Applicant's attorney was unable

¹ Test. Bizzari, p. 133.

² Test. Bizzari, p. 137

³ Test. Bizzari, p. 137

⁴ Test. Bizzari, p. 137

⁵ Test. Bizzari, pp. 133-134

⁶ Test. Bizzari, pp. 134-135

⁷ Test. Bizzari, pp. 136-137

or unwilling to offer any information on how the search/access to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information.

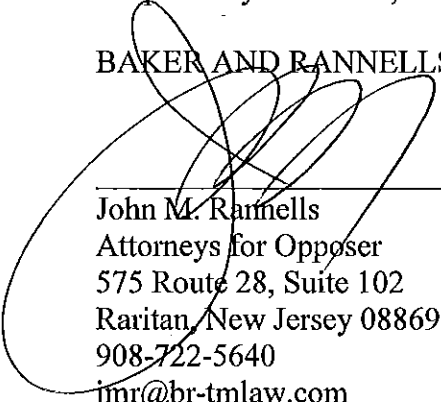
As such, the documents comprising Applicant's Exhibit A-5 lack foundation, are unauthenticated, and constitute hearsay (especially here, where Applicant appears to be attempting to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998).

Exhibit A-5 was timely and properly objected to by Nautica's counsel during Ms. Bizzari's testimony. See, Friedman objections at pp. 133, 137-138, and 139.

Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein

Respectfully submitted,

BAKER AND RANNELLS PA

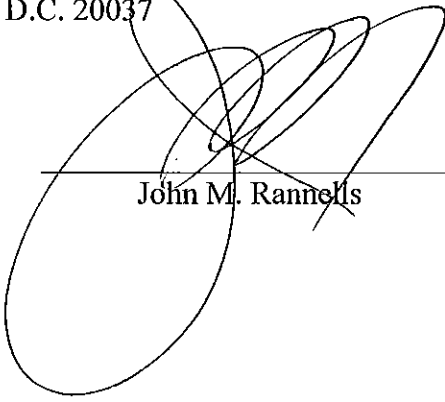


John M. Rannells
Attorneys for Opposer
575 Route 28, Suite 102
Raritan, New Jersey 08869
908-722-5640
jmr@br-tmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing OPPOSER'S OBJECTIONS TO APPLICANT'S THIRD NOTICE OF RELIANCE AND TO EXHIBIT A-5 INTRODUCED BY APPLICANT DURING THE TESTIMONY DEPOSITION OF OPPOSER'S WITNESS, MARGARET BIZZARI was forwarded by first class postage pre-paid mail by depositing the same with the U.S. Postal Service on this 26th day of May, 2009 to the attorneys for the Applicant at the following address:

Howard G. Slavitt, Esq.
Shannon H. Bates, Esq.
Saul Ewing LLP
2600 Virginia Avenue, NW
Suite 1000 – The Watergate
Washington, D.C. 20037



John M. Rannells